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No. 85-616

IN THE

Supreme Court of the United States

October Term, 1985

SHARON STEEL CORPORATION,

Appellant,

v.

THE CITY OF FAIRMONT, WEST VIRGINIA, EDWIN C. DALEY, City Manager of Fairmont, West Virginia, and GEORGE R. HIGINBOTHAM, City Attorney of Fairmont, West Virginia,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

MOTION IN THE ALTERNATIVE TO DISMISS OR AFFIRM

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OPINION BELOW

This is an appeal from a decision of the Supreme Court of Appeals of the State of West Virginia rejecting appellant's contention that the Resource Conservation and Recovery Act of 1976, as amended, (RCRA), 42 USCA § 6901 *et seq*, preempts a municipal ordinance which prohibits the disposal of hazardous waste virtually in the middle of the seventh largest city in the State of West Virginia.

JURISDICTION

The jurisdictional requisites are adequately set forth in the appellant's jurisdictional statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pertinent constitutional and statutory provisions are set forth in the appellant's jurisdictional statement.

STATEMENT OF THE CASE

Appellant does not take issue with the statement of the case as set forth in the appellant's jurisdictional statement, except to say that in 1979 Sharon permanently ceased operations in the City of Fairmont as the result of a consent decree arising from a complaint filed by the United States for violation of the Clean Air Act.[1] From the time of the closure of the facility until the State high court's decision, Sharon has maintained an unpermitted hazardous waste dump.

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[1] *United States v. Sharon Steel Corporation, Civil Action No. 79-0011-C(H) (N.D. W. Va.)*

ARGUMENT

THIS APPEAL LACKS A SUBSTANTIAL FEDERAL QUESTION.

Appellant contends that the decision of the West Virginia Supreme Court of Appeals will:

1. Thwart Congress' comprehensive national plan for managing hazardous waste;

2. Directly conflict with the national permit program under RCRA; and

3. Promote the proliferation of local vetoes of federal hazardous waste facility permitting decisions.

Appellant's contentions have no merit whatsoever. RCRA provides that the Administrator of the United States Environmental Protection Agency (EPA) may authorize states to implement their own hazardous waste management programs in lieu of a federally administered program. 42 U.S.C. § 6926 (b). Such authorization occurs after EPA review, public participation and hearing, and a finding by the EPA Administrator that the state program is consistent with and effective as RCRA and the EPA regulations promulgated pursuant thereto. 42 U.S.C. § 6926 (b) and (d).

This Court has interpreted RCRA as placing primary responsibility for the statute's administration and enforcement in the hands of state regulatory agencies[2] such as, in this case, the West Virginia Department of Natural Resources:

> . . . we find no "clear and manifest purpose of Congress", *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230 to preempt the entire field of interstate waste management or transportation either by express statutory command, see *Jones v. Rath Packing Co.*, 430 U.S. 519. 530, 531, or by implicit legislative design, see *City of Burbank v.*

[2] *West Virginia has been authorized by the Administrator to administer and enforce a state hazardous waste program to be consistent with RCRA.*

Lockheed Air Terminal, 411 U.S. 624, 633. To the contrary, Congress has expressly provided that "the collection and disposal of solid wastes should continue to be primarily the function of state, regional and local agencies. . . 42 U.S.C. § 6901 (a) (4). *City of Philadelphia v. New Jersey*, 437 U.S. 617, 620 fn. 4 (1978).

Moreover, RCRA explicity provides that states and political subdivisions may impose requirements which are more stringent than those imposed by RCRA:

> . . . nothing in this chapter shall be construed to prohibit any state or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such (EPA) regulations. 42 U.S.C. § 6929 (Parenthetical added).

The legislative history of RCRA indicates that Congress intended to allow states to be more stringent than EPA regarding selection of sites for the disposal of hazardous wastes. See 125 Cong. Rec. at 13247-13248. See also H. Dept. No. 96-1444, 96th Cong. 2d. Sess. at 40-41.

West Virginia's approach, as interpreted by the State's Supreme Court in the case at bar, to disposal of hazardous wastes allows cities to prohibit the disposal of hazardous waste within their jurisdiction. The ability of a West Virginia city to prohibit hazardous waste disposal does not in any way thwart reaching the goals of RCRA. West Virginia Code § 8-12-5, providing the general powers of municipalities, authorizes only urban areas, cities, towns and villages, to prohibit hazardous waste disposal. Rural areas outside the jurisdiction of West Virginia municipalities comprise the great majority of the State's 15,475,000 acres and that area is available for hazardous waste disposal. Surely RCRA does not mandate that states must allow hazardous waste disposal in populated urban areas if other more sparsely populated alternative sites are available. It is perfectly reasonable for West Virginia to limit hazardous waste disposal to rural areas. Indeed, state and local decisions to prohibit disposal from certain areas is explicitly recognized in 42 U.S.C § 6929 which relates to state and local requirements for "site selections."

CONCLUSION

In sum, RCRA explicitly recognizes the power of states and authorized political subdivisions to regulate hazardous waste disposal "site selections". Only West Virginia cities, towns and villages are empowered by state law to prohibit hazardous waste disposal within their boundaries. Even if every one of West Virginia's cities, towns and villages were to enact ordinances like the one at bar, there would remain million of acres of rural land where such disposal cannot be prohibited in the manner authorized by West Virginia Code § 8-12-5. Obviously RCRA's objectives can be obtained without forcing urban areas to be the depository of hazardous wastes.

RESPECTFULLY SUBMITTED

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